SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1242

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I.

The Opinion.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which the petitioner seeks to have reviewed, is found in the record at pages 61 to 74, of the Transcript. It is reported in 126 F. (2d) 659.

II.

A Concise Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

This statement is set out in the preceding petition under Point II thereof (pp. 6-8) which is hereby adopted and made a part of this brief by reference.

III.

A Concise Statement of the Case Containing All That Is Material to the Consideration of the Questions Presented.

This statement is set out in the preceding petition under Point I thereof (pp. 1-6) which is hereby adopted and made a part of this brief by reference.

IV.

A Specification of the Assigned Errors Which Are Urged.

This specification is set out in the preceding petition under Part III thereof (pp. 9-17) which is hereby adopted and made a part of this brief by reference.

V.

THE ARGUMENT.

Summary of The Argument.

A. As to Part II, B (3) and II, D (4), of the petition (pp. 7, 8)—The action of the United States Circuit Court of Appeals for the Seventh Circuit taken on April 13, 1942 (R. 75) in striking the Petitioner's Petition for rehearing and brief, which was seasonably filed below, from the files, extends the time to file this petition until three months from that date.

B. As to Part III, A, of the petition (pp. 10-12)—The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical, and therefore contrary to the law of the state of Indiana.

C. As to Part III, B, of the petition (pp. 12-15)—The opinion declares an ambiguity which cannot arise by according to the language of the section its "popular and usual significance".

D. As to Part III, C, of the petition (pp. 15-17)—The Record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the states in the light of *Erie R. R. v. Tompkins*, 1938, 304 U. S. 64.

E. As to Part IV, C, of the petition (pp. 20-23)—The opinion not only is erroneous under the Indiana law, but factually it will lay down a new erroneous rule of law for Indiana, which is the prevailing law of that state.

F. As to Part IV, D, of the petition (pp. 23-24)—The opinion, unless reviewed, will destroy the contract rights, not only of this petitioner, but also of other Fraternal Benefit Associations similarly situated.

Point A.

As to Part II, B (3), and II, D (4) of the petition (pp. 7-8)—The action of the United States Circuit Court of Appeals for the Seventh Circuit taken on April 13, 1942 (R. 75), in striking the petitioner's petition for rehearing and brief, which was seasonably filed below, from the files, extends the time to file this petition until three months from that date.

There would seem little doubt that the petition for the writ is filed in time. Normally, it is not good policy to set up straw men just in order to knock them down; however, since distribution of petitions is made normally before

reply briefs can be made available, we ask the court's pardon for intruding a matter which normally should come by way of reply.

The opinion and judgment were entered on February 9, 1942 (R. 61 to 74). The petition for rehearing and brief were filed on February 20 (R. 75). This was within the fifteen days permitted by the rules of the lower court (Ruling, p. 12 of the rules of said court, effective May 31, 1941), on April 13, 1942. The petition for rehearing and brief in support thereof were ordered stricken from the files "because of the impertinent and scandalous matter contained therein". Even if this Court cannot take judicial notice of the rules of the lower court, the lower court stated the grounds for striking the petition from the files, and since it did not state that they were not filed in time, the controlling implication arises that they were seasonably filed.

A petition which is dismissed after it has been seasonably filed extends the time within which the petition for a writ of certiorari may be filed to three months from the date the petition is dismissed. *Gypsy Oil Co.* v. *Esco*, 275 U. S. 498; *N. L. R. B.* v. *MacKay*, 304 U. S. 333 (Tit. 28, Chapt. 9, Sec. 350, U. S. C. A.).

We submit that under these authorities, this petition may be filed at any time within three months from April 13, 1942. It is true that an entry striking a brief and petition from the files upon the grounds shown is not a dismissal, but the action of the court constitutes a disposition of the petition for rehearing, and any disposition of the petition, after the petition is seasonably filed, tolls the running of the statute.

To hold otherwise would destroy the rights of a litigant which would constitute additional punishment to the litigant over and above that arising out of the act of the court in striking the petition and brief from the files and would

confer a benefit upon the opposing party which is not in accord with the purpose behind the action of a court in striking pleadings from the files for the grounds stated in this case.

In other words, the action of the court is in the nature of a punishment of the litigant for the action of its counsel, in this, that the competent matter which might have persuaded the court to change its ruling is not considered, because of the "scandalous and impertinent matter" which was contained within the pleading. A court takes action such as it did in this case to preserve its dignity and its records. The litigant is made to suffer by being denied any consideration of competent or persuasive matter likewise found in the pleading. It would be inconsistent with the policy of the law to say that the striking of a pleading upon the grounds stated in this order did not constitute "a disposition of the pleading", and that it would have the effect of further depriving a litigant of his rights, since this would be a further and unnecessary punishment beyond that effected by the order, namely, the denial of a right to have the material matter in his pleading considered.

Also, courts of last resort have always been zealous in protecting litigants from being deprived of rights to appeal to them which are conferred by statute. Were this Court to hold that the act of a lower court in striking a pleading from the file did not toll the operation of a statutory jurisdictional provision as to time, then a lower court could deprive a litigant of the right to a statutory provision in any case by simply withholding its ruling until the statutory time had expired. No charge is made that any court would do it, but it is the policy of the law to prevent the possibility of such action being taken.

It is therefore submitted that the action of the lower court, taken on April 13th, 1942, was simply an order disposing of a petition for rehearing seasonably filed, and that,

as such, the operation of the jurisdictional statute involved was tolled from February 9, 1942, until the date upon which disposition was made, to-wit, April 13, 1942.

POINT B.

As to Prat III, A, of the Petition (pp. 10-12)—The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical, and therefore contrary to the law of the State of Indiana.

The objection to the opinion under this point addresses itself to the fact that after the opinion properly analyzed the meaning of the clause of the contract in question and defined it in the term of the "operating cause" construction, then the factual analysis supplies a witness to the operating cause by reasoning which, on its face, is illogical, and therefore contrary to the law of the State of Indiana, as expressed by its highest court.

The leading case construing the meaning of an eyewitness clause—in fact the case from which every other opinion in the United States stems, is the case of *Lewis* v. *Brotherhood, etc.*, 1907, 194 Mass. 1. The opinion below quotes extensively from this case, from pages 64 to 68 of the opinion. The Massachusetts opinion permitted a recovery where two young people were observed by several witnesses, in a happy frame of mind, paddling a canoe upon a river in Massachusetts. They rounded a bend—a short time later a scream, described as a scream of fear, was heard, and, apparently not more than ten minutes after they were observed and the scream was heard from around the bend of the river, other witnesses came upon their upturned canoe, and the bodies were recovered close to the place where the upturned canoe was observed.

There was an eyewitness clause in that contract. The

Supreme Court of Massachusetts, in construing the clause, developed the theory that if enough facts were witnessed, from which a then operating cause of the accident, in that case drowning, could be legally inferred as a reasonable inference, then the clause of the contract was satisfied. Of course, *the facts must also be sufficient to furnish the inference that the operating cause* thus inferable *continued to operate until it acted.* It is to be noted that the "operating cause" in the *Lewis* case was the canoe being paddled upon the water; that is, something was being done to the canoe, and that something was observed and also, it *was reasonable to infer that that something,* the thing observed, *continued to operate until the accident which occasioned the death,* in that case the upsetting of the canoe and the drowning, *actually happened.*

In transposing by analogy the reasoning of the *Lewis* case to the actual discharge of a gun, the analogy requires that the thing *being done to the gun,* from which it may be inferred that the discharge happened, is the thing which must be observed. It is not enough for a witness, after a gun has discharged and a person has been killed, to see a gun which has been discharged, and cleaning materials around it, to satisfy the "operating cause" theory. *Werner* v. *T. P. A.* (1929) (C. Tex.) 31 F. (2) 803, 803-804, 1930 aff'd (C. C. A. 5) 37 F. (2) 96, 97; *Roeh* v. *Bus. Men's Ass'n, etc.* (1914), 164 Ia. 199, 145 N. W. 479, 480-482. The reasoning is obvious. Such a witness as involved in the last two cases sees the effect of some "operating cause" which he did not see. He sees an "operated cause", whose nature is unknown; but he does not see things, facts, in action prior to the time the gun discharged, from which he may infer the effect. A person who sees things or facts in action, sees the cause of a subsequent effect, the discharge of a gun—such a person sees the "operating cause". What he must see in order to satisfy the "operating cause" construc-

tion of these contracts is *the thing being done to or done with the gun,* from which it is reasonable to infer that the thing observed continued in action until it served as an "operating cause" of the discharge of the gun. The cases which support this analysis are as follows:

Pride v. *Interstate Bus. Men's Acc. Ass'n., etc.,* 1927, 207 Ia. 167, 216 N. W. 62, at 65;

Wild v. *Sovereign Camp,* 1933, (La. App.) 149 So. 906, at 908;

Villamarette v. *Sovereign Camp, etc.,* 1938, (La. App.) 178 So. 648, at 651.

(Note: The Southern Reporter is the official reporter of La. App. cases.)

Peculiarly, the court below, very clearly, analyzed the contract and came to the correct conclusion as to its meaning, which we have hereinabove set out. Its words are as follows:

> "What is the operating cause in the case at bar? In the Lewis case it was the tricky canoe *being paddled in the river.* In the case at bar, it was a loaded shotgun *in the process of being cleaned.* In the instant case, it is the situation in which there is the ever-present danger of a gunshot wound. This situation was observed by Mrs. McGowan as she left the office an hour before the discharge of the gun."
>
> (R. 72.) (The italics are ours.)

While it is true that in most of the decided cases, the thing being done to the gun, the cleaning of it, in the *Wild* and *Villamarette* cases, *supra,* the use of it in a search for intruders, the *Pride* case, *supra,* was followed very shortly by the discharge of the gun, so that the continuing in existence of the thing observed until the gun discharged is a very reasonable inference.

The opinion in the instant case says:

> "We attach no significance to the fact that an hour or more of time elapsed between the time Mrs. McGowan *saw the deceased in the act of cleaning the gun* and his injuries,"
>
> (R. 72.) (The italics are ours.)

The opinion also says:

> "We have found no authority in which the lapse of time between the time the operating cause was observed and the happening of the event causing death was held to be material."
>
> (R. 73.)

We do not quarrel with these statements of the lower court. We would not be here if this was all that the factual situation showed. In other words, we recognize that in determining how long a time may elapse between the observance of an "operating cause" capable of causing the discharge of a gun, and the time of its discharge, involves the determination of a question of fact, a question of ultimate fact, upon which the minds of reasonable men may differ. We would not be appealing a question of fact, unless the time elapsed was so great as to disclose that the reasoning was not "in accordance with correct and common modes of reasoning," that is, a half day or a day elapsed between the observation of the operating cause and the known time of the discharge of a gun. We are not asking this Court to say that the elapsed time of one hour converts a question of fact into a question of law under the above standard of law laid down, because it is unreasonable.

However, the opinion does say this:

> "This situation (the cleaning of a loaded shotgun) was observed by Mrs. McGowan as she left the office * * *. We attach no significance to the fact * * * and the fact that during this space of time *the deceased*

> *had left his office for several minutes,* as the deceased *was found in the same situation with relation to the operating cause as Mrs. McGowan observed him to be in when she left the office.*" (R. 72.) (The italics are ours.)

This is the part of the opinion which we positively declare constitutes an illogical analysis of the facts, under the operating cause theory, and which is not "in accordance with correct and common modes of reasoning."

The record discloses that the deceased was last seen in the process of cleaning his gun by Mrs. McGowan at 12:15 P. M. He was taken by an elevator from his floor in the office building to the street at 12:45, and did not return to his office until about ten minutes before his death. Reese Young, who saw Wigginton a few seconds after the discharge of the gun, fixes this time as between 1:15 and 1:30 o'clock. Therefore Wigginton returned to his office between 1:05 and 1:20, and he was gone out on the streets of the city of Evansville, either from 12:45 to 1:05, twenty minutes, or from 12:45 to 1:20, thirty-five minutes. He was seen by no one after he entered his office, at either 1:05 or 1:20, until Reese Young found him dead, or dying (R. 26 to 27, Stip. of Facts #13).

We declare first, that, applying "correct and common modes of reasoning" to these facts, it cannot possibly be said that the possible operating cause, *the process of cleaning the gun, which Mrs. McGowan saw at 12:15, continued in operation* as a potential operating cause *until it acted* to produce the deceased's death, because the facts affirmatively deny this and show that the operating cause which Mrs. McGowan observed was terminated and abandoned by the deceased, to the positive knowledge of at least two people for a period of between twenty and thirty-five minutes. Therefore, an essential element of the "operating cause" construction of this contract, namely, that it can be

inferred from the facts that the *cause observed* continued in operation without interruption until it acted, is positively absent from the facts in this case, because we need not infer —we actually know from the stipulated facts—that the cause observed was abandoned by the deceased for from twenty to thirty-five minutes. Therefore, it ceased to act, and what Mrs. McGowan saw could not possibly have been the "operating cause" of the deceased's death.

No one knows, and there are no facts from which any person can infer, except by resort to speculation and conjecture, that Wigginton ever again started the process of cleaning the gun after he returned to his office, because no one saw him for the ten minutes that elapsed between the time of his return to his office and the time he was found dead or dying. Therefore, the opinion is in error when it states that, "the deceased was found in the same situation with relation to the operating cause as Mrs. McGowan observed him to be in when she left the office". This is true because the Werner case and the Roeh case, *supra*, distinctly disclose that the mere finding of a man dead or dying, surrounded by a firearm and cleaning materials does not throw any light on the "operating cause", that is, what he was doing with the gun to cause it to go off. Such evidence, and this is all that Reese Young saw, merely discloses that some cause has operated and produced an effect, but it constitutes no evidence of what that operating cause was.

It is true that, reasoning from effect to cause, two equally reasonable ultimate facts may be inferred; that is, suicide or accidental discharge of the gun which was found. But, by contract, the parties here have stated that this method of determining a right of recovery is eliminated by the eye-witness clause. This opinion, itself, says the same thing (R. 71, last par. on page). The parties, by contract, require that the operating cause, the facts from which the

operating cause may be reasonably inferred, all must be observed as a then present, potential cause, in order to afford recovery. The parties under the law of Indiana are entitled to their contract.

It is contrary to the law of Indiana to give a party a recovery where the facts are not sufficient to comply with the terms of the contract to entitle them to a recovery, without regard to whether any court or any individual believes that the contract should not be as it is or that it should be stricken down. The striking down of such a contract is the province of the legislature of the State of Indiana, and not of any court.

> "Mere surmises, guesses or conjectures of the jury can lend no support to their verdicts. In Babcock *v.* Pittsburgh R. R. Co., 140 N. Y. 308, it is said, '*Verdicts must stand upon evidence* and not upon conjecture, however plausible, *and if the situation be such that the plaintiff cannot furnish the evidence, the misfortune is his.*'" (The italics are ours.)
>
> *Cleveland, etc., R. R. Co.* v. *Miller,* 1897, 149 Ind. 491, 508.

> "An inference of fact in the instant case upon which to base negligence of the appellant in respect to the loose object on the floor would have to rest upon conjecture, guesswork or speculation, upon which verdicts cannot properly be based."
>
> *J. C. Penny, Inc.* v. *Kellermeyer,* 1939 (Transfer Den. 1939), 107 Ind. App. 253, 264.

It sometimes happens that an intermediate court states the same rule of law in clearer language than a court of last resort. For that reason, we offer the following citation:

> "We are not unmindful of the settled rule that, in determining what has been established by the evidence, courts and juries may consider not only the facts directly proved, but also *all reasonable inferences that*

may be properly drawn therefrom. However, this rule cannot be applied arbitrarily but judgment must be exercised in so doing, *in accordance with correct and common modes of reasoning.''*

Russell v. *Scharfe,* 1921, 76 Ind. App. 191, at p. 197.

We have established that the conclusion which the court below reached, as shown in its opinion, that Mildred McGowan was an eyewitness to the operating cause of the respondent-plaintiff's decedent's death is not logically tenable, when judged ''in accordance with correct and common modes of reasoning,'' that it grants a recovery in a situation where ''the plaintiff cannot furnish the evidence''. Therefore, the opinion is contrary to the expressed law of the State of Indiana in existence at the time the opinion and decision in this case were made.

POINT C.

As to Part III, B, of the Petition (pp. 12-15)—The opinion declares an ambiguity which cannot arise by according to the language of the section its ''popular and usual significance.''

The opinion declares, for the first time that we can discover in thirty-five years, that there is an ambiguity in the language involved. The courts have uniformly held that there must be an eyewitness to the discharge of the firearm, as that language is understood in light of the liberalizing construction of the operating cause theory, which we have just discussed, but this opinion says that this language is ambiguous, and that it will permit a recovery where there is an eyewitness to the dying. As we will point out, the effect of such a construction is to destroy, for all practical purposes, the contract rights of this petitioner as contained in its more than seventy-seven thousand contracts in effect throughout the United States.

The language of the opinion involved reads as follows:

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely, it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company, and so as to give protection to the insured if this can reasonably be done. Masonic Acc. Ins. Co. *v.* Jackson, 200 Ind. 472, 164 N. E. 628.
>
> "In the case at bar, there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference, which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy, which is ambiguous, so as to mean that there shall be an eyewitness to the 'dying.' We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."
>
> (R. bottom p. 73 to end of opinion, p. 74.)

The opinion states its own ambiguity. It states two constructions. It is elementary that if there are two constructions, each of them must be such as accord to the language of the clause its "popular and usual significance." Furthermore, it cannot arise by imputing to the language "an unusual meaning to the language used in an insurance contract." Therefore, in order for the alternative construction that the clause will be satisfied by an eyewitness to the dying, to be legally a recognizably ambiguous construction, it must be one which will stand the test of the above quoted language taken from the case of *Shedd* v. *Automobile Ins., etc.*, 1935, 208 Ind. 621, pp. 628-629.

In making this test, it is proper to consider whether the alternative meaning is consistent with the declared purpose

of the clause and the existing construction of the clause. The opinion, itself, declares the purpose as being a clause intended "to avoid the presumption indulged in by courts and supposed to arise from the natural love of life and the instincts of self-preservation, used by the courts to meet the defense of suicide, and to require the event to be taken from the solitude sought by suicides." (R. 71, last rhet. par.)

Actually, it is a little more than that, in that, when the petitioner makes a tender of $500.00 under this clause, or when it pleads the clause, it eliminates, entirely, and deprives itself of the right to rely upon the defense of suicide. This is true because the relinquishment of this right is the consideration which supports its right to pay $500.00 in any event where there is no eyewitness. And it is further true because the clause speaks of "the alleged accidental discharge of firearms" so that when $500.00 is tendered, or a liability of $500.00 is admitted by pleading the clause, the accidental nature of the discharge is admitted, and the petitioner says: "We are only liable to pay $500.00 to you because there is no eyewitness to the operating cause of this discharge." It was because of this analysis of the meaning of the contract that the petitioner in this case withdrew its defense of suicide before going to trial, since it had both tendered $500.00 before trial and also pleaded the clause in question. This being true, any construction which would be reasonable must be one which is in accordance with the intent and purpose of the clause. But, we ask you, "What possible light upon the operating cause of the discharge of a firearm can a person throw, who sees the dying of another?" (See *Werner* and *Roch* cases, *supra,* and our analysis of this proposition under our argument under Point B.)

Furthermore, we ask you, in the exercise of the common capacity of men to reason, what possible information or knowledge can a person have who comes upon another who

is dying as the result of the discharge of a firearm, who only sees the result of some unknown operating cause, unless his testimony would be the basis to combat a defense of suicide by showing that the body, surrounded by a firearm and cleaning materials, would lead to an equally reasonable inference that the gun must have been accidentally discharged? However, since the defense of suicide is not in issue, then the proposition that an accidental cause might be inferred as equally reasonable as that of suicide, is evidence which is not material to the issue arising between the parties or upon the pleadings under this contract as construed by the lower court, itself.

Is not an alleged ambiguous meaning, which has no significance and would furnish no evidence upon the issue, presented by the contract, a useless meaning, an unreasonable meaning, and a purposeless meaning?

If this is true, there is no ambiguity, because the alleged ambiguity is meaningless.

Furthermore, the clause says that there must be an eyewitness to the discharge of the gun "except the member himself." The alleged ambiguous meaning must be tested by reading it into the contract, with all of the language in the contract as it is found. In other words, we certainly cannot create an ambiguity by striking out any of the language of the contract which would make the ambiguous construction appear fantastic or incongruous. But if you read the ambiguity assigned to this clause in connection with all of the language in it, you reach this following meaning: "There can be no recovery unless there is an eyewitness to the dying *except the member himself.*" This alleged ambiguity then, of course, says, and irrefutably infers, that a person is an eyewitness to his own dying. But the Supreme Court of Indiana says that "you cannot assign unusual significance or meaning to the language of an insurance contract," in order to create liability, and it says that language

must be understood in its "usual and popular significance."

Are lawyers and judges so removed from the ordinary, common man—do they live in such a rarefied atmosphere of language and thought—that they believe that the common man who understands and uses language in its "popular and usual significance," ever thinks of himself as being "an eyewitness" to his own death or dying?

An Edgar Allan Poe or a Coleridge, hopped up with dope, or even an Oscar Wilde, after a period of dissolute roistering, might possibly conceive of themselves as being an eyewitness to their dying, but the thought is certainly incomprehensible to those of us who are normal people, and lead normal lives, who enter into normal contracts and who use language in its "popular and usual significance." It is such people that the law is designed to serve, and it is the thoughts of such people which furnish the standards which courts read into language. We submit that the alleged ambiguity leads to such a fantastic concept that its invalidity is apparent upon its face.

Finally, we think this court will take judicial notice of the fact that the members of an organization, known as The Order of United Commercial Travelers, has among its membership normal middle-class people. Such people seldom put a premium upon stressing death. Such people seldom have morbid thoughts. Yet, the concept of creating liability under a policy of insurance by making the stressing of death a prerequisite to recovery is certainly a morbid one. It is not a thought which is in the mind of the average, common man. It is not a thought which arises by giving to words their "popular and usual significance."

Again, an ambiguity which embodies within its words the concept of morbidity is not one which recommends itself to courts, judging language by the standards of the normal man, as being a valid construction.

The Supreme Court of Indiana has condemned the construction of a contract, in order to create liability against an insurance company, in an unusual or peculiar manner within a very recent period of time. We quote:

> "This clause was part of the contract of insurance or indemnity; it is not ambiguous, and the contract as a whole must be construed as any other contract, and the language is to be accorded its popular and usual significance.
>
> 'It is not permissible to impute an unusual meaning to language used in an insurance contract.'
>
> *Hoosier Mutual Automobile Insurance Company* v. *Lanam* (1923), 79 Ind. App. 629, 632, 137 N. E. 626.

> "It is generally held that, if the language used in an insurance policy is ambiguous, or admits of two constructions, it will be construed in favor of the insured as against the insurer in such a way as to protect the interest of the insured who has paid a consideration for the indemnity. Hoosier Mutual Automobile Ins. Co. *v.* Lanam, supra; Federal Life Insurance Company *v.* Kerr (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230, 42 C. J. 790, sec. 356. However, in the absence of ambiguity in an insurance contract, neither party can be favored in its construction; and, where a contract of insurance contains mutual stipulations, each is to be construed favorable to the party entitled to claim its benefit. 32 C. J. 1152, secs. 254, 265."
>
> *Shedd* v. *Automobile Ins. Co., etc.* 1935, 208 Ind. 621 at pp. 628-629.

Also, *Automobile Underwriters, Inc.* v. *Camp*, 1940, 217 Ind. 328, at p. 342, where the following language is found:

> "Courts are not at liberty to make contracts for individuals. They have a right to make such contracts as in their judgment are proper. It may be unfortunate in this case that Mr. Summers did not carry insurance

that would protect occupants of his automobile, but that fact does not change the terms of the policy. For the errors mentioned, the cause is reversed with instruction to sustain appellant's motion for a new trial."

Therefore, the opinion violates the declared law of the State of Indiana, in that it creates an ambiguity by the unusual, fantastic use of language, which is contrary to the declared law of the State of Indiana. It follows that the alleged ambiguity read into this contract is not an ambiguity which can be permitted to stand, under the law of the State of Indiana. To permit it to stand is to destroy the effect of *Erie R. R.* v. *Tompkins*, and thrust upon the courts of Indiana, and the citizens of Indiana, a declaration of Federal law which is contrary to that of the State of Indiana.

It must be remembered, further, that, without this alleged ambiguity, Reese Young is not a witness of any fact which will permit a recovery under the "operating cause" construction of this contract. (*Werner* case, *Roch* case, repeatedly cited *supra.*) Therefore, the decision and opinion of the lower court is contrary to law, because it permits a recovery upon a construction of a contract which is not permitted under the laws of the State of Indiana.

POINT D.

As to Part III, C, of the petition (pp. 15-16)—The record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the States in the light of *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64.

(1).

The opinion says:

"We lay to one side the question of the validity of the amendment to the constitution and proceed to a

determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment."

(R. 63, 1st full rhet. par.)

(2).

The "eyewitness" clause amendment, limiting the liability under the contract was adopted and became effective in 1931 (R. 24-25, Stip. of Facts #7), some twenty-five years after the respondent-plaintiff's decedent became an insured member (R. 22-24, Stip. of Facts #3 to 6).

(3).

Notwithstanding the fact that the application for membership, (R. 22, Stip. of Facts #3), and the Class A Insurance Certificate (R. 23, Stip. of Facts #5) contain language which make the subsequent limitation of liability, the eyewitness clause, binding upon the plaintiff and her decedent under the law of Ohio:

The Ohio Gen'l Code, 1930, Sec. 9467 and Sec. 9469, passed 1904;

1905, *Tisch* v. *Protective Home Circle,* 72 Oh. St. 233, 74 N. E. 188, 188 to 192;

1935, *Van De Water* v. *U. C. T.* (C. C. A. 2) 77 F. (2) 331, 333;

The amendment might not have been binding on them in Indiana.

1908, *Court of Honor* v. *Hutchins,* 43 Ind. App. 321, 324 (R. Den. 1909);

1911, *Court of Honor* v. *Rausch,* 50 Ind. App. 161 (R. Den. 1912).

(4).

But the Supreme Court of Indiana has held that the validity of the Constitution of a foreign fraternal benefit

association and of its power to amend the same so as to bind its members holding insurance contracts are solely governed by the law of its state of incorporation, here Ohio, and that the courts of Indiana will bow to the laws of the state of incorporation upon these subjects.

1914, *Supreme Council, etc.* v. *Logsdon,* 183 Ind. 183, Sylli. 1 and 2, pp. 183, 187-190;

1914, *T. P. A.* v. *Smith,* 183 Ind. 59, Syll. 1, p. 59, Syll. 4, pp. 59-60, Syll. 5, pp. 60, 68, 74-80;

1905, *Garrique* v. *Kellar,* 164 Ind. 676, 681, 683.

Under *Erie Railroad* v. *Tompkins,* 384 U. S. 64, the Federal courts were bound to follow the last cited cases and hold that if the amendment was valid in Ohio, it was binding upon the plaintiff in Indiana, notwithstanding the two *Court of Honor* cases in Indiana.

(5).

The petitioner-defendant did not prove the law of the State of Ohio in the Federal courts, as required by the Indiana, "Uniform Judicial Notice of Foreign Law Act" (Acts Ind. Gen'l Ass. 1937, Ch. 124, Sec. 1 to 7, p. 703) Burns, 1933 Stat. Ann. (Dec. 1941, Cum. Pack. Supp.) 2-4801 to 2-4807.

(6).

Thereupon the respondent-defendant contended in the District Court and in the Circuit Court of Appeals that since *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, the District Courts no longer had the power to take judicial notice of the law of a State, other than that in which they sat, but that the laws of such State had to be proved in the manner required by the law of the State in which the District Court sat, notwithstanding *Owing* v. *Hull,* 1835, 9 Peters 607, 625, 34 S. C. R. 246, 253.

The question is presented by the objection of the respondent-plaintiff to the introduction into evidence of the eyewitness clause amendment (R. bottom of p. 16 to top of p. 17, also bottom p. 18 to middle p. 19) upon the grounds, among others, that "it impairs the obligations of the contract * * *; that it destroys vested rights of the decedent * * *."

The District Court gave no written opinion, although it did overrule the objection (R. 17, middle of page, also p. 19, middle of page).

The Circuit Court of Appeals' action is hereinabove set out under this Point II, C, (1).

(7).

The question arose, not only in this case, but also in *Cray, McFawn & Co.* v. *Hegarty, et al.* (Dist. Ct. So. Div. N. Y. 1939) 27 Fed. Supp. 93, 95, Syll. 1, Aff'd, Per Curiam 1940, without reference to the question, 109 F. (2) 443, where the power to take judicial notice was confirmed, notwithstanding *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64.

Since the latter opinion, two Federal courts have stated their power to take judicial notice, but the question apparently was not raised.

Eastman etc. v. *Warren* (C. C. A. 5, 1940) 109 F. (2) 193;

George v. *Stanfield* (D. C. Ida. S. D. 1940) 33 Fed. Supp. 486.

(8).

The fact that the question is arising indicates a need of the Federal bench and bar to be advised and set at rest upon this question by the Honorable Justices of this Court.

Point E.

As to Part IV, C, of the Petition (pp. 20-23)—The opinion not only is erroneous under the Indiana law, but factually

it will lay down a new erroneous rule of law for Indiana, which is the prevailing law of that State.

The petitioner asks this Court to grant the petition and issue the writ for the reason that, although technically, the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit is not binding upon the courts of Indiana, factually, and for all practical purposes, it will have that effect. This is true, because a court occupying the position in the Federal court system, the dignity and the reputation for correct decision which the court in question occupies, when it renders a decision and writes an opinion, exercises great and almost controlling persuasive effect upon the courts of last resort within its jurisdiction. Therefore, great care should be taken to be sure that an opinion of such a court correctly states the law of the State, whose law is being interpreted. If this care is not taken, all of the benefit sought to be conferred upon litigants by *Erie R. R.* v. *Tompkins* will be destroyed.

The purpose of *Erie R. R.* v. *Tompkins* was to strike down inequalities between litigants subject to the jurisdiction of the laws of any State of the union. (In this connection, this petitioner, by doing business in Indiana, submits itself to the jurisdiction of the courts of that State. We need not cite the statutory provision because the "Stipulation with Reference to Record on Appeal" (R. 6 to 7) discloses that the Superior Court of Vanderburgh County originally had jurisdiction of the petitioner, and that the petitioner was duly served with summons issued out of that court. This could not be true if it were not subject to the jurisdiction of the courts of Indiana.)

Therefore, this petitioner-defendant, as well as the respondent-plaintiff, had the right to have this case decided in the Federal courts under the law of the State of Indiana. Since *Erie R. R.* v. *Tompkins,* it can be charged with no ulterior motive in going into the Federal court and we have

pointed out in the petition, *supra*, pp. 20-22, that there are many honest reasons which motivate a non-resident in removing a case to the Federal court. Therefore, this petitioner is entitled to stand before this Court and assert its right to have this case decided under the laws of the State of Indiana. More than that, however, it is entitled to ask this Court to see to it that the lower Federal courts conform to the law of Indiana and declare it properly; because factually, their decisions now are bound to have great persuasive and factual effect in controlling the subsequent opinions of the courts of last resort of each State in the Union.

This is true because, in theory at least, since *Erie R. R.* v. *Tompkins*, a court of the United States actually declares the law of a State when it renders an opinion involving State questions. We therefore respectfully urge this Court to issue the writ in this case in order to assert to all litigants of every State in the Union that it will police the Federal courts and see that they actually decide cases according to State law, in compliance with the duty which *Erie R. R.* v. *Tompkins* placed upon them.

We respectfully submit that this Court, having instituted the rule that an opinion of a court of the United States must follow the state law involved, assumed thereby a burden which it cannot shirk, by denying a petition for writ of certiorari in a case like this; namely, a burden to see that the courts of the United States follow the State law, and that they not only do not violate the State law, but that they also do not set up erroneous decisions and opinions with reference to the law of a state, which are contrary to the existing law of the State, and thereby corrupt the law of a State as they find it at the time they render their decision.

If this Court does not assume the burden and responsibility which rests upon it by reason of its decision in *Erie*

R. R. v. *Tompkins,* then we will have a return of the same evil which that case sought to strike down; namely, we will have the courts of the United States misconstruing and ignoring the laws of a State upon questions involving the laws of such State, so that the United States Circuit Courts of Appeal will become the supreme court of all of the States within the jurisdiction of those courts. And gradually, we will build up a body of law for those States, dictated to those States by the Federal courts, particularly the Circuit Courts of Appeal, which domination will be much more severe than that which existed prior to *Erie R. R.* v. *Tompkins.* This is true, because prior to *Erie R. R.* v. *Tompkins,* a State court could say, with good grace, "We will ignore the opinion of the Federal court because it is declaring Federal law, and we will declare the law of the State." But today, a lawyer, citing a decision of a Circuit Court of Appeals—this decision for instance—will say to the Supreme Court of Indiana, "But you know that this is the law of Indiana, because under *Erie R. R.* v. *Tompkins,* the Circuit Court of Appeals for the Seventh Circuit had to declare the law of Indiana. The judges of that Federal court are great men, learned in the law—they are free from political influence or bias of any kind. And who are you, judges chosen by a democratic election system, fraught with political corruption, to say that you have greater legal minds than such judges? And therefore, you must accept the law that the Circuit Court of Appeals for the Seventh Circuit laid down as the law of Indiana, because of the stature, dignity, knowledge and ability of the men who cause that court to function, as its judges."

This is no idle argument. Any judge who has been a lawyer and tried cases will recognize that this argument, couched possibly in more diplomatic language, will be

thrown at every supreme court of every State within the jurisdiction of every United States Circuit Court of Appeals, from now on, upon every question involving the laws of every State of the Union. Thus, there will grow up a domination of the States by the Federal judiciary, which will be far worse in its effect, and more iron-clad in its control over the rights of the litigants of every State in the Union than that which this Court sought to strike down in *Erie R. R.* v. *Tompkins.*

We, therefore, respectfully, but earnestly, submit that if this Court denies the petition for the writ in this case, where the law of the State of Indiana is so openly disregarded, it will be tantamount to a failure to assume the responsibility which this Court voluntarily created and inferentially assumed by the doctrine announced in that case.

The petitioner's counsel heartily endorse the concept set out in *City of Indianapolis* v. *Chase National Bank, etc.*, 1941, — U. S. —, 86 L. Ed. p. 27, at p. 29 (headnotes 1 to 3), and in the dissenting opinion of Mr. Justice Frankfurter and the Chief Justice in *Glasser* v. *U. S.*, — U. S. —, 62 S. C. R., 457, at 473; namely, that the Supreme Court of the United States, in declaring its decisions will look behind the legal technicalities to the substance of the issues involved and will decide the case in order to dispose of the substantial, factual considerations actually present. It is true that the principle was not declared upon a set of facts similar to that presented by this record, but it is also true that a declaration of principle, once declared, should be applied to every new factual situation and the implications of that application to the new factual situation followed to their logical conclusion, and the result accepted without regard to the position of the litigant asserting them. In other words, if the principle is sound, and it is, this fraternal benefit association has as much right to invoke

it under the Anglo-Saxon concept of jurisprudence as a city seeking relief from a public utility, or the United States of America in a criminal case. We will lose the most precious thing in our law, if we develop the habit of differentiating between parties who are entitled to invoke the law, or if we limit the right to invoke the law to any particular class of persons and deny it to another class. The sins of unequal application of the law to parties, of the last half century, are no justification for perpetuating them in this day, just because the character of the person sinned against, or his economic position may now be the reverse of what it was then.

POINT F.

As to Part IV, D, of the Petition (pp. 22-24)—The opinion, unless reviewed, will destroy the contract rights, not only of this Petitioner, but also of other Fraternal Benefit Associations similarly situated.

The petitioner further asks this Court to grant the petition and issue the writ because the question here involved is of importance to a large group of our society and involves contract rights of many fraternal benefit associations and their members. It also involves the interest of the many members of fraternal benefit associations in the assets of their associations, and presents actuarial problems much greater than appear upon the face of the opinion, not only to this petitioner, but to many other fraternal benefit associations having similar clauses in their contracts or constitutions.

The opinion in this case, particularly that part which declares that there is an ambiguity in the clause in question, effectually destroys the contract for all practical purposes. As we have stated in the Petition and Brief, this is the only case that we have found which declares that there

is the ambiguity charged in this case, in this clause, during the thirty-five years that similar clauses have been construed. To hold that the clause can be satisfied by an eyewitness to the dying is to destroy the purpose of the clause; namely, to eliminate, altogether, the question of suicide in consideration of an offer to pay $500.00, where there has been no eyewitness to the "operating cause" of the discharge of the gun. As we have previously pointed out in this brief, a person, who witnesses the dying of someone, witnesses the effect of some cause, which *has operated before he came upon the scene.* The idea that he can furnish any evidence which will throw conclusive light upon the operating cause is illogical and contrary to the "operating cause" construction of the contract. Therefore, it destroys all previous constructions of the contract and destroys the contract which the parties had a right to make. It throws back the companies to the position of asserting suicide defenses in all cases instead of permitting them to pay $500.00 where there was no eyewitness to the operating cause.

Some people may think that this is beneficial to policyholders. Evidently, this thought was subconsciously present and dominated the opinion of the Circuit Court of Appeals in question; and therefore, the opinion, some people will say, should be looked upon as one liberalizing the law for the benefit of the poor, or the needy, or the widows of the members of these fraternal benefit associations. Such thinking assumes that a certain fact is true, which assumption is not warranted by actualities. In other words, with this clause destroyed by the construction given it, no company can afford to settle cases, where there was an *eyewitness who came up after* the operating cause *had acted,* for $500.00, but it will be forced, in fairness to its membership, if it believes from investigation that the act was one

of suicide, to make that defense and to refuse to pay anything in settlement. But, not all suicide defenses are unsuccessful—a reasonable amount of them are won. Also, in order to make a suicide defense in the case of men, very often, it is the duty of the investigator for the company to *cherchez la femme*. Human nature being what it is, this search, very often, is successful, and the motive for suicide is discovered to be an illicit association with a woman, the dragging forth of which through the process of a trial is never pleasant for the plaintiff seeking to recover. Furthermore, its effect upon children of the suicide, if there are children, is likewise not conducive to the full development of their lives, human nature again being what it is, and other children being the cruelest beings in all the animal kingdom.

Therefore, we find in this case, as we find in all cases, that where decisions which men make are based upon the best of intentions, the results of decisions contrary to the law are often entirely different from those which the persons making them contemplated.

In addition, the number of these cases which arise and are settled or disposed of is not measured by the number which have gone to litigation. The provision in this contract was written into it by as democratic a process as any available to society in its present state of perfection. These associations do not act like mutual insurance companies. Fraternal benefit associations, such as your petitioner, are operated by the members, for themselves. The members, themselves, determine what shall be the provisions and conditions for payment of benefits. They determined by due democratic process that they should limit the payment of the death benefit to $500.00 in case death resulted from a gunshot where there was no eyewitness except the

member himself. It was the intention of the members that this amendment should control. A fraternal benefit association is not like a corporation where a few can control it, but each member has a vote, and in fact, has the opportunity to exercise his vote, in determining that his policy of insurance shall be limited, as this policy is limited in this case.

They have a ritual and they actually have conventions at which delegates, chosen from out of the ranks of the members, attend, and determine the rights which shall be conferred under their insurance provisions, upon themselves, as well as other members. Even if it could be said that these conventions are boss dominated, so also are political conventions, but we abide by the results thereof, and courts do not interfere, or interfere with reluctance, with the decisions of political conventions. Therefore, courts should be reluctant, by judicial decision, to strike down and destroy, by the creation of ambiguities which do not factually exist, the contract provisions, which fraternal benefit associations, by present day democratic processes, have seen fit to place in their constitutions and contracts.

We have furnished affidavits from but three of the many such associations whose contracts are virtually destroyed by the opinion in question.

It is the declared policy of this Court in recent years, by so many decisions that they need not be cited, that courts must not interfere with legislative or democratic process, but must construe rights as they find them.

It is respectfully submitted that this petitioner is as fully entitled to the benefit of that announced policy of this Court as an administrative board, a labor union, or any other litigant who may present his petition for writ of certiorari to this Court, in a case where the law of a State has been violated in a manner so clearly demonstrated as the record

in this case demonstrates the violation which this petitioner seeks to have reviewed.

Respectfully submitted,

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,

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